91-602

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

October Terms, 1991

ADAM O. RENFROE, JR.
Petitioner

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Adam O. Renfroe, Jr.
Suite 245
One Penn Center
1617 JFK Blvd.
Phila., PA 19103

QUESTIONS PRESENTED

Where after a high profile trial, a Court of Appeals remands the matter to a district court with directions to grant a new trial unless that court determines that it could hold a nunc pro tunc competency hearing, a procedure disfavored in the law, and that court takes three years to determine that issue, during which time the Defendant serves his prison term and period of parole, will the re-trial of the Defendant in another high profile trial violate the Double Jeopardy Clause because of such judicial delay?

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v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Adam O. Renfroe, Jr., your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on July 1, 1991.

OPINIONS BELOW

On July 1, 1991, the United States Court of Appeals for the Third Circuit entered a Judgment Order denying Rehearing and Rehearing en banc, which has not been officially reported, but is reproduced in Appendix A, infra at A1 - A2. That Court had previcusly filed Memorandum Opinion, which was not officially reported but is reproduced at Appendix B infra, pages A3 - A25. That Opinion affirmed the decision entered by the United States District Court for the District of Delaware on January 7, 1991 denying a Motion to dismiss based upon double jeopardy grounds. Said decision has been officially reported at 745 F. Supp. 203 (D. Del. 1990). An abridged copy of that Opinion containing matters pertinent to the instant appeal is reproduced at Appendix C, infra, pages A26 -A44.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit denying rehearing was entered on July 1, 1991. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides in pertient part:

"Amendment 5

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

STATEMENT OF THE CASE

This matter represents the rare occasion where a defendant is tried and convicted during a high profile prosecution and then, upon appeal, has the matter remanded to the District Court, to determine the issue of the defendant's competency at the time of trial. During the three years it took the District Court to determine this issue, the petitioner served his sentence and period of parole. Petitioner now faces, more than five years after his first trial, another high profile prosecution. He submits that this extreme period of judicial delay implicates the protections of the Double Jeopardy Clause.

The Petitioner, a Pennsylvania attorney, was indicted on March 4, 1986, and charged with bribery and obstruction of justice in violation of 18 U.S.C. Sections

201 (d) and 1530, respectively. The offenses, are alleged to have occurred on or about January 30, 1986, approximately thirty-two (32) days preceding indictment. Mr. Renfroe was convicted on June 12, 1986 and sentenced on July 29, 1986 to five years imprisonment followed by three years probation.

On August 7, 1987, the Third Circuit Court of Appeals remanded the matter to the District Court with directions to grant a new trial unless it could determine that a meaningful nunc pro tunc hearing could be held on the issue of Mr. Renfroe's competency at the time of trial and sentencing. See **United States v. Renfroe**, 825 F.2d 763 (3rd Cir. 1987). The Honorable Joseph J. Longobardi determined that a meaningful nunc pro tunc competency hearing could be so held.

Prior to the hearing a motion for recusal was filed by defense counsel based upon the conduct of the trial Court, which occurred subsequent to remand. After first denying the Motion for Recusal in late 1987 and holding the competency hearing in July, 1988, Judge Longobardi recused himself in August, 1988 pursuant to a renewed motion for recusal.

The matter was transferred to the Honorable Jane R. Roth also from the District of Delaware. After an additional two (2) years had elapsed, Judge Roth concluded on August 21, 1990, that the government had not met its burden of proving that Mr. Adam Renfroe was competent at time of trial and sentencing. See **United States v. Renfroe,** 745 F. Supp. 203 (D. DEL. 1990). Accordingly, the District Court overturned Petitioner's conviction and granted a new trial more than three (3) years after the

Third Circuit remanded the matter to the District Court.

In a pre-trial Motion, Petitioner moved to dismiss the Indictment upon the ground that further prosecution would violate the Double Jeopardy Clause of the United States Constitution. On January 7, 1991, the District Court denied Defendant's Motion. However, during a pre-trial conference, the Court opined that Defendant's Motion was not frivolous. The Defendant filed a timely notice of appeal to the Third Circuit on January 8, 1991.

That Court affirmed the District Court via a Memorandum Opinion filed May 31, 1991. A Petition for Rehearing and Rehearing en banc was denied on July 1, 1991.

Subsequent to these deliberations either the entire District Court of Delaware recused itself in this matter or the Third

Circuit directed that a Judge from another district preside at trial. In any event, the Honorable D. Brooks Smith of the Western District of Pennsylvania will be presiding at the Petitioner's retrial should this Court deny this petition.

REASON FOR GRANTING THE WRIT

RETRYING PETITIONER FIVE YEARS AFTER HIS ORIGINAL CONVICTION WHERE HE HAS SUFFERED THE EMBARRASSMENT AND NOTORIETY OF A HIGH PROFILE TRIAL, FULLY SERVED HIS PRISON SENTENCE AND SUCCESSFULLY UNDERGONE REHABILITATION, VIOLATES THE DOUBLE JEOPARDY CLAUSE AND UNITED STATES V. HALPER.

Petitioner seeks review of a Court of Appeals decision narrowly interpeting the Double Jeopardy Clause. Because of the unusual circumstances of this case and because of this Court's recent revitalization of the Double Jeopardy Clause, it is respectfully submitted that given the highly unusual circumstances of this case, this decision is out of step with the current state of Double Jeopardy jurisprudence.

In United States v. Halper, 109 S. Ct. 1892 (1989) and Grady v. Corbin, 109 L.Ed 2nd 548 (1990), this Court.

significantly expanded traditional Double Jeopardy protections. In **Halper**, the Court recognized for the first time that jeopardy can attach under the Clause even in a purely civil proceeding so long as the civil punishment is punitive, not remedial. In **Grady v. Corbin**, the Court barred a subsequent prosecution when there were successive prosecutions for the same "conduct".

Clearly, **Halper**, is but one example of the fact that a defendant may not be twice punished for the same conduct. Here, the Petitioner submits that a second prosecution will simply be punitive in nature because he has already endured a high profile prosecution, conviction, appeal process, service of a full term of imprisonment, years spent on parole, and has successfully undergone rehabilitation. Additionally, he has agonized through four

and one-half years of post-verdict procedures, marked by lengthy judicial delays, during which time his fate was unknown, and his life was in limbo. Thus, it is submitted that the Petitioner has been punished by this extremely lengthy period of judicial delay. Given the fact that the Double Jeopardy Clause protects against governmental oppression, whether from the prosecution or the judiciary, **United States v. Jorn**, 400 U.S. 470, 484-483 (1971) (Plurality Opinion), the failure to sanction the instant judicial delay will only invite further abuse while allowing the petitioner to twice suffer governmental oppression because of this delay.

Accordingly, the excusing of such delay herein would emasculate one of the underpinnings of the Double Jeopardy Clause, protection against Government oppression by our judiciary. See **Jorn**, **supra**. As the

Second Circuit noted in **United States v. Stayton**, 791 F.2d 17 (2nd Cir. 1987), our Courts must not only police the behavior of the prosecutor and defense counsel, but they must also police themselves. Id. at 20., citing **United States v. Pringle**, 751 F. 2d 419, 429 (1st Cir. 1984).

Secondly, the **Halper** Court recognized that there are "Humane Interests" which are safeguarded by the Clause's proscriptions against multiple punishment. Hence, it is submitted that under the circumstances of this case, no reason except a new punishment argues for a second trial. In fact, a liberal application of **Halper** would encompass Petitioner's concerns that the delays in this case after remand from the Third Circuit were of such magitude that the extended anxiety of facing a second trial itself constitutes a second punishment proscribed by the Double Jeopardy Clause.

This Court implicitly recognized in **Halper** that there are situations which clearly do not provide adequate protection to defendants, such as Halper, who was plainly being subjected to multiple punishment, albeit civil in name, for the same offense.

The Court, thus, adopted a test that throws the constitutionality of most civil or quasi-criminal sanctions into doubt when they are imposed subsequent to a criminal prosecution. According to the Court, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment..." 109 S.Ct. at 1902 (emphasis added). Under this standard, subsequent sanctions may now be deemed punishment for double jeopardy purposes.

The Third Circuit in its Opinion

was unconcerned with the fact that the Defendant would suffer continued "embarrassment, anxiety, expense, insecurity and the possibility that he may be found guilty even though innocent." **United States v. DiFrancesco**, 449 U.S. 117, 136 (1980). It stated that "these are the types of 'collateral consequences' that result and are to be expected from a criminal prosecution." Opinion at A13-16. Accordingly, it rejected Petitioner's argument that **Halper** does not offer protection under the circumstances of this case where there have been such extreme judicial delays during which time he has already suffered his punishment and undergone complete rehabilitation.

It is conceded that the Double Jeopardy Clause's protections against retrial do not ordinarily inure to the benefit of a criminal defendant who

successfully challenges his conviction on appeal. However, the basis for this precept is not present in the case at bar. As stated in **Burks v. United States**, 427 U.S. 1, 15 (1978), this precept is predicated in large measure upon society's interest in insuring that the guilty are punished.

> "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceeding leading to conviction." Ibid., quoting **United States v. Tateo**, 377 U.S. 463, 466, 84 S.Ct. 1587, 1589, 12 L.Ed. 2d 448 (1964).

Here, society has not been deprived of its interest in seeing Mr. Renfroe punished. Rather, he has already been punished sufficiently for his alleged involvement in the case by serving two years of incarceration; two years of parole, four years of suspension from the Bar and the

myriad "collateral consequences" described above. He continues to be punished every day that he remains under the cloud of this prosecution.

While the embarrassment, anxiety, expense, etc., may ordinarily be the "collateral consequences" of a typical criminal prosecution, this matter is not the typical case. The four years of deliberations between sentence and new trial completely deflate that premise.

For the "Humane Interests" language in **Halper** to have validity, the Double Jeopardy Clause should be given an expansive interpretation when applied to situations like those in the instant matter. No explanation has ever been given for the lengthy judicial delays, yet Petitioner suffers therefrom. This matter is unusual, and it provides circumstances, akin to those in **Halper**, where the prior decisions of this

Court simply do not provide adequate protection to a defendant who is being subjected to multiple punishment.

It is respectfully urged that this Court grant the Writ of Certiorari and render guidance to our Courts where cases occur under these types of unusual circumstances.

CONCLUSION

For all of the foregoing reasons, it is requested that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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ADAM O. RENFROE, Jr.
Pro Se

APPENDIX A

No. 91-3024

UNITED STATES OF AMERICIA

v.

ADAM O. RENFROE, JR.,
Appellant

(D.C. Crim. No. 86-00023)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ALDISERT, Circuit Judge

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who

participated in the decision of this Court and to all the other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT:

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CIRCUIT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS

No. 91-3024

UNITED STATES OF AMERICIA

V.

ADAM O. RENFROE, JR.,
Appellant

On Appeal from the United States Court for the District of Delaware
D.C. Criminal No. 86-00023
(Honorable Jane R. Roth)

Submitted Under Third Circuit Rule 12(6)
May 31, 1991

Before: STAPLETON, SCIRICA and ALDISERT, Circuit Judges

MEMORANDUM OPINION

SCIRICA, Circuit Judge

Adam O. Renfroe, Jr. appeals the denial of his motion to dismiss his indictment on grounds of double jeopardy. He also requests dismissal because of judicial delay and misconduct. We will affirm.

I.

On June 12, 1986, Renfroe, an attorney, was convicted of a two-count indictment charging him with bribery of a witness (18 U.S.C. Section 201(d) (1982) (count I) and obstruction of justice (18 U.S.C Section 1503 (1988) (count II). On July 28, 1986, he was sentenced to five years imprisonment (count I) and three years probation (count II) to run consecutively.[1]

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[1] Renfroe's sentencing commenced August 5, 1986. His parole began August 25, 1988 and runs until

At the sentencing hearing, Renfroe brought forth evidence of his: (1) long-term cocaine addiction, (2) previous medical and legal problems resulting from his addiction, and (3) recent admission to a detoxification center, in order to support a request to postpone sentencing so that he could complete his detoxification treatment. The district court then raised, sua sponte, Renfroe's competency to stand trial and to participate in the sentencing process. Renfroe's attorney specifically declined to assert at the hearing that Renfroe was yor had been incompetent at trial, and the district court concluded that there was "no reasonable cause to believe" that Renfroe was incompetent to participate in the sentencing hearing. The court stated

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August 31, 1991. His probation will commence August 31, 1991 for a three year period.

that it did not consider whether Renfroe had been competent at the time of trial because the issue had not been timely raised. On appeal, we held that pursuant to 18 U.S.C. Section 4241 (1988),[2] " [t]he request for a hearing to determine Renfroe's competency at trial was . . . timely and should have been addressed by

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[2] Section 4241 reads in part:

(a) Motion to determine competency of defendant.-- At any time after the commencement of a prosecution for an offensive and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defeact rendering him mentally incompentent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

18 U.S.C. Section 4241 (1988)

the distric court." United States v. Renfroe, 825 F.2d 763, 766 (3d Cir. 1987). We remanded so that the district court could decide whether it could hold a meaningful nunc pro tunc hearing on his competency at the time of his trial and sentencing. We held that if the district court concluded that there could be a meaningful competency hearing, and Renfroe was found competent, no new trial would be required. However, if the district court determined that it could not conduct a meaningful hearing, Renfroe's conviction would be overturned and a new trial granted when he was competent to stand trial. Id. at 767-868.

The district court held that it could conduct a meaningful nunc pro tunc competency hearing. United States v. Renfroe, 678 F. Supp. 76, 80 (D. Del. 1988). The court then ordered that Renfroe be committed for thirty days to a

federal facility for an evaluation of his retrospective and current competency to stand trial. This evaluation was performed between February 24 and March 28, 1988. After a competency hearing on July 18 and 19, 1988, Renfroe renewed a recusal motion before the district court rendered a decision.[3] Although the district court said he was impartial and unbiased, he recused himself "out of a super-cautious concern for the appearance of impartiality." App. 26.

The newly assigned district judge decided independently that a meaningful nunc pro tunc hearing could be conducted based on the testimony presented at the

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[3] Renfroe requested recusal alleging that the district court showed impartiality when he telephoned Renfroe's unit manager at the federal facility, asking the manager's impressions of Renfroe's competency. The court denied ever seeking such impressions, explaining that he telephoned only to request medical documents that might aid in determining Renfroe's mental condition.

competency hearing in July, 1988. On August 21, 1990, the district court overturned Renfroe's convicton and granted him a new trial after finding that the government had not met its burden of showing that he was competent at the time of his trial and sentencing. United States v. Renfroe, 745 F. Sup. 203, 210-11 (D. Del. 1990). At this time, Renfroe had begun serving parole but had not yet started serving probation.

On January 2, 1991, the district court denied Renfroe's motion to dismiss his indictment on double jeopardy grounds. United States v. Renfroe, No. 86-23-JRR (D. Del. Jan. 7, 1991). The court reasoned that the double jeopardy clause does not prevent retrial when the conviction has been set aside because of trial error. Id. at 2-7. The court also held that failure to prove competency is not equivalent to a finding of

insufficiency of evidence, which might prevent a retrial. Id. at 7-10. Thus, "the result of a court's finding a defendant is incompetent to stand trial is not to enter a judgment of acquittal, but to defer trial until the defendant is competent." Id. at 9 (citing Drope v. Missouri, 420 U.S. 162, 183 (1975)). Renfroe filed a timely appeal.[4]

II.

Renfroe presents two reasons for dismissing his indictment on double jeopardy grounds: (1) he has completely served his sentence and therefore should not be punished again, and (2) his conviction was reversed becaused of the government's failure to prove competency which bars retrial. Because a double jeopardy claim raises a constitutional issue, our standards of review is plenary.

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[4] Because Renfroe's attorney has withdrawn his representation on appeal, Renfroe is acting pro se in this matter.

See United States v. Ciancaglini, 858 F. 2d 923, 926 (3d Cir. 1988); United States v. Aguilar, 849 F 2d 92, 95 (3d Cuir. 1988), cert. denied, 11 S. Ct. 395 (1990).

The Supreme Court has held that the double jeopardy guarantee protects a defendant from three separate abuses: (1) a second prosecution for the same offense after a defentant's acquittal; (2) a second prosecution for the same offense after a defendant's conviction; and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The Court has consistently held, however, that "the double jeopardy guarantee imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside," United v. DiFrancesco, 449 U.S. 117, 131 (1980) (quoting Pearce, 395 U.S. at 720)), most notably due to trial error. Lockhart v.

Nelson, 488 U.S. 33, 39 (1988); Tibbs v. Florida, 457 U.S. 31, 39-40 (1982); United States v. Dixon, 658 F. 2d 181, 187 (3d Cir. 1981).

Instead, if a defendant is convicted upon retrial, the punishment already served must be "credited" in the sentence imposed for the subsequent conviction for the same offense. Pearce, 395 U.S. at 718-19. Moreover, a harsher sentence can be imposed upon retrial if the judge provides appropriate reasons. Id. at 723; United States v. Busic, 639 F. 2d 940, 947 (3rd Cir.) cert. denied., 452 U.S. 918 (1981) citing Pearce, 395 U.S. at 721.

In this case, Renfroe did not receive the maximum penalty for either offense. [5] Renfroe, slip op. at 3.

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[5] At the time that Renfroe was convicted, the maximum penalty under Section 2901 (d) was fifteen years imprisonment, a fine of $20,000.00 or three times the value of the bribe

Moreover, although Renfroe claims that his sentence has been "fully served," the government contends that on August 24, 1990, when the district court ordered a new trial, Renfroe had only served a period of incarceration and was still on parole. He had not yet completed parole or started the three years probation that was to be served consecutive to his parole release. We agree that Renfroe had not fully served his sentence when the new trial was granted.[6]

We believe that the district court correctly denied Renfroe's motion. Renfroe's reliance on United States v.

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offered, and disqualification "from holding any office of honor, trust, or profit under the United States." 18 U.S.C. Section 210 (e) (1982). The maximum penalty under Section 1503 is five years imprisonment, a fine of $5,000, or both. 18 U.S.C. Section 1503 (1988).

[6] We do not decide the issue whether a retrial is barred if a defendant has fully served his sentence. This issue was neither addressed nor decided in Pearce.

Halper, 490 U.S. 435 (1989) is misplaced. In Halper, the manager of a company providing medical services for patients eligible for medicare benefits was convicted of submitting 65 false claims in violation of the criminal false-claims statue. He was sentenced to two years imprisonment and fined. Based on the facts established by the defendant's criminal conviction, the district court granted the government summary judgment in its suit against defendant under the False Claims Act. Under the Act's remedial provisions at that time, the defendant appeared to be subject to a penalty of more than $130,000. The district court concluded that because this amount had no "rationale relation" to the government's actual loss (approximately $16,000), it qualified as punishment which, in view of the defendant's previous sentence, was barred by the double jeopardy guarantee.

The court limited the government's recovery to double damages costs. The Supreme Court remanded for a reassessment of costs, holding that in the "rare case" where a subsequent civil penalty can be characterized as "punitive" not "remedial," the second penalty violates the double jeopardy guarantee. Id. at 449-52. There is no similar situation here.

Renfroe also contends that "the ordeal" of his retrial causes and will cause him embarrassment, expense, and anxiety. But the Court has not considered a second trial following a reversal of conviction on appeal among the types of "governmental oppression" protected by the double jeopardy guarantee. United States v. Scott, 437 U.S. 82, 91 (1978); see also United States v. Busic, 639 F. 2d 940, 945 (3d Cir.), cert. denied, 452 U.S. 918 (1981) (approving retrial even if it would

cause defendant embarrassemnt, expense, "the ordeal of a continuing state of anxiety and insecurity, and would enhance the risk that he may be found guilty"). In addition to any harm that may come to Renfroe's professional reputation, these are the types of "collateral consequences" that result and are to be expected from a criminal conviction. See Jessup v. Clark, 490 F. 2d 1068, 1070 (3d Cir. 1973); Renfroe slip op. at 4,5.

B.

We also find unconvincing Renfroe's second contention that the reversal of his conviction for lack of competency to stand trial is the equivalent fo reversal for insufficient evidence to prove guilt beyond a reasonable doubt. In Burks v. United States, 437 U.S. 1 (1978), the Supreme Court clarified the distinction between

reversals based upon insufficient evidence and reversals based upon trial error. Double jeopardy bars retrial in the former but not in the latter case. Id. at 18; see also Lockhart v. Nelson, 488 U.S. 33, 39 (1988); Vogel v. Commonwealth of Pa., 790 F. 2d 368, 370 (3d Cir. 1986); Dixon, 658 F. 2d at 187. One reason given for this bar is that the government should not have a second chance to offer additional or improved evidence. United States v. Curtis, 683 F. 2d 769, 733 (3d Cir.), cert. denied, 459 U.S. 1018 (1982); United States v McQuilkin, 673 F. 2d 681, 684-85 (3d Cir. (1982).

Contrary to Renfroe's assertions, this is not a case where a conviction has been overturned because the government failed to produce sufficient evidence. See, e.g., United States v. Leppo, 634 F. 2d 101, 103 (3d Cir. 1980) (discounting defendant's argument based upon

insufficiency of the evidence rather than trial error). "[T]he reversal of Renfroe's conviction indicates only that the trial court should have held a hearing and found Renfroe incompentent to stand trial at that time." Renfroe, slip op. at 9. The district court's subsequent finding that Renfroe was incompetent to stand trial and to defer retrial until Renfroe was found to be competent was not the equivalent of entering a judgment of acquittal. Id. (citing Drope v. Missouri, 420 U.S. 162, 183 (1975)).

The double jeopardy clause does not bar retrial where the conviction was overturned as a result of judicial error, because such result "implies nothing with respect to the guilt or innocence of the defendant." Burks, 437 U.S. at 15; see also Leppo, 634 F. 2d at 103-05 (stating that the double jeopardy clause does not bar retrial in cases where there was error

in the judicial process). We agree with the district court then that although the government has the burden of proving that Renfroe is competent to stand trial, competency is not a specific element of any of Renfroe's crimes. See United States v. DiGilio, 538 F. 2d 972, 988 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977; Renfroe, slip op. at 8. Therefore, "failure to prove competency does not constitute insufficiency of the evidence." Renfroe, slip op. at 8. Because retrial does violate the double jeopardy clause, the district court did not err in denying Renfroe's motion to dismiss the indictment.

C.

In his appeal, Renfroe contends for the first time that his indictment must be dismissed because of (1) "extraordinary judicial delays" that prejudiced his defense, and (2)

inappropriate judicial conduct. Generally, we "refuse to consider issues that are raised for the first time on appeal." Frank v. Colt Indus., Inc., 910 F. 2d 90, 100 (3d Cir. 1990) (quoting Newark Morning Ledger co. v. United States, 539 F. 2d 929, 932 (3d Cir. 1976)); see also United States v. Kirkumura, 918 F. 2d 1084, 1101 (3d Cir. 1990) ("[I]n the ahsence of special circumstances, such as a change in the law, we will not consider on appeal an issue that the parties failed to present to the district court.") (quoting Flick v. Brog-Warner Corp. 892 F. 2d 285, 287 (3d Cir. 1989)).

Renfroe did not ask the district court to dismiss his indictment under the Federal Speedy Trial Act, 18 U.S.C. Sections 3164-74 (1988),[7] Fed. R. Crim. P.

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[7] In his Brief, Renfroe presents his arguments in terms of the Federal Speedy Trial Act requirements. However, in his

48, or any other rule. Moreover, we have no record to adequately review his objections. We may consider a pure question of law, however, even if it was not raised before the district court, to avoid a miscarriage of justice or where the issue has public significance. Loretangeli v. Critelli, 853 F. 2d 186, 189 n.5 (3d Cir. 1988). We do not believe Renfroe's contentions fit these criteria.

Regardless, we do not believe that Renfroe's contentions have merit. The Federal Speedy Trial Act requires dismissal if trial is not commenced within 70 days. 18 U.S.c. Sections 3161(c)(1), 3162 (a)(2) (1988). The Act provides automatic, specfically prescribed, exclusions from the set time limits for

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Reply Brief, he states he is not asserting a Speedy Trial argument, "but delay as an extraordinary circumstance that implicates policies underpinning the Double Jeopardy provisions." Appellant's Reply Brief at 4. The cases he cites are inapposite.

many reasons. Id. Section 3161(h)(1) - (7) (1988). Renfroe contends that over 70 days of nonexcludable time had passed; yet he cites no facts supporting this assertion. As we have noted, in his Reply Brief, Renfroe maintains he is not relying on the Speed Trial Act.

With respect to due process claims based on delay, we evaluate them under Barker v. Wingo, 407 U.S. 514 (1972): (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. Id. at 530; see also Government of the Virgin Islands v. Duberry, 923 F. 2d 317, 323 (3d Cir. 1991).

Our review of the docket sheet shows that at least some of the reasons for the delay were attributed solely to

Renfroe.[8] Continuances requested by defense counsel constitute excludable time under the Speed Trial Act. See, e.g., Gordon V. Duran, 895 F. 2d 610, 613 (9th Cir. 1990) (defendant cannot claim a speedy trial violation when the delay was due to ten continuances that were requested by defendant's counsel); United States v. Kucik, 909 F. 2d 206, 211 (7th Cir.), cert. denied, 111 S. ct. 791 (190) ("Where a defendant actively participates in a continuance covering a decrete period of time . . . he cannot then sandbag the court and the government by counting that time in a speedy trial motion.")

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[8] In the district court, briefing was needed for the following circumstances initated by Renfroe: (1) opposition to a nunc pro tunc competency hearing (D.I. 73); (2) opposition to a competency hearing at the Federal Correctional Institution in Butner, North Carolina (D.I. 90); (3) appeal of the order for the competency examination (D.I. 98); and (4) opposition to the release of Renfroe's medical records, which were eventually released to the government (D.I. 118). None of these challenges was successful.

Renfroe makes no claim that he asserted his right to a speedy trial and the docket sheet does not reveal that Renfroe requested dismissal. "[F]ailure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal." 18 U.S.C. Section 3162(a)(2) (1988); United States v. Kaylor, 877 F. 2d 658, 663 (8th Cir.), cert. denied, 110 S. Ct. 198 (1989) (defendant waived his right to dismissal under the Speedy Trial Act where he failed to move for dismissal of indictment prior to trial); United States v. Kington, 875 F. 2d 1091, 1108 (5th Cir. 1989) (same).

Renfroe also contends that his defense at retrial will be prejudiced by the loss of witnesses and exhibits. But other than himself, Renfroe presented only one other witness at the first trial, a Philadelphia police officer who testified for five minutes. Also, Renfroe has

acquired from the government the few exhibits that he introduced at trial. Although Renfroe states that he needs additional witnesses and exhibits for his retrial, he cites nothing specific.

Finally, Renfroe's contention that the district court's recusal bars retrial is without merit. His reliance on United States v. Jorn, 400 U.S. 470 (1971) is misplaced.

IV.

We will affirm the district court's denial of Renfroe's motion to dismiss his indictment on grounds of double jeopardy. We will deny Renfroe's request for dismissal on the basis of judicial delay and misconduct.

TO THE CLERK:

Please file the foregoing opinion.

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Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERCIA

Plaintiff,

V.

ADAM O. RENFROE, JR.

Defendant.

Criminal Action No. 86-23-JRR

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MEMORANDUM OPINION

Wilmington, Delaware

January 7, 1991
ROTH, District Judge

Defendant, Adam Renfroe ("Renfroe"), an attorney was convicted on June 12, 1986, of bribing a witness in violation of 18 U.S.C. Section 201(d) (1982) and obstruction of justice in violation of 18 U.S.C. Section 1503 (1988). Renfroe was sentenced on July 29, 1986 to five years imprisonment followed by three years of probation. At his sentencing hearing, the issue of Renfroe's competency to stand trial was raised for the first time, and the court denied Defendant's motion to conduct a competency hearing. Upon Defendant's appeal of his conviction, the U.S. Court of Appeals for

the Third Circuit remanded the case for a determination of whether a meaninful nunc pro tunc hearing could be held on the issue of Renfroe's competency at the time of trial and sentencing, and depending on the outcome, for a new trial. United States v. Renfroe, 825 F. 2d 763, 767-68 (3d Cir. 1987).

On remand, the case was reassigned to us, and we determined that a meaningful nunc pro tunc competency hearing could be held. We ultimately concluded that the Government had not met its burden of proving that Renfroe was competent at the time of his trial and sentencing. We therefore ordered that his conviction be overturned and a new trial be granted. United States v. Renfroe, 745 F. Supp. 203, 210-11 (D. Del. 1990).

On January 2, 1991, we held a pre-trial conference in preparation for Renfroe's new trial. Presently before

this Court are two pre-trial motions which were discussed at the pre-trial conference: (1) Defendant's Motion to Dismiss the Indictment on double jeopardy grounds and (2) Government's Motion for Notice of Entrapment Defense. At the pre-trial conference, we denied the motion to dismiss the indictment, and stated that we would set forth our reasons more fully in a Memorandum Opinion. We also took the motion for notice of entrapment defense under advisement. This Memorandum Opinion will set forth our reasoning on both motions, and will address each of these motions in turn.

I. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

Defendant contends in his motion that the indictment should be dismissed because a second prosecution is barred by the Double Jeopardy Clause of the Fifth

Amendment. Defendant raises two different arguments. First, the motion states that Renfroe has completely served his sentence of five years imprisonment and three years probation which was imposed on July 29, 1986. Therefore, the argument continues, Renfroe has already served full punishment and cannot be punished again. Second, Defendant contends that his conviction was reversed due to insufficiency of the evidence, and consequently a retrial is barred under Lockhart v. Nelson, 488 U.S. 33 (1988).

A. Sentence Already Served

Defendant argues that the Double Jeopardy Clause prohibits a retrial because he has already served his sentence in full. However, the Double Jeopardy Clause does not prohibit retrying a defendant whose conviction has been set aside due to trial error. Tibbs v. Florida, 457 U.S. 31, 39-40 (1982); United

States v. Tateo, 377 U.S. 463, 465 (1964). "[T]o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Joepardy Clause was intended to protect." United States v. Scott, 437 U.S. 82, 91 (1978).

Rather, the appropriate remedy required by the Double Jeopardy Clause is that if a defendant is again convicted upon retrial, the "punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense." North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969). In fact, if a defendant is convicted on retrial, the court is permitted to consider the defendant's conduct subsequent to the first conviction and to impose a more severe sentence, so long as the judge sets

forth her or his reasons affirmatively. Id. at 723, 726. By crediting time served toward the new sentence, the court ensures that the defendant will not receive a greater penalty than that authorized by the legislature. See Ohio v. Johnson, 467 U.S. 493, 499 (1984).

In the present case, Renfroe was not sentenced to the maximum penalties possible under the law. Renfroe was convicted of bribing a witness in violation of 18 U.S.C. Section 201(d) (1982), and of obstruction of justice in violation of 18 U.S.C. Section 1503 (1988). The maximum penalty under Section 201(d) is a fine of $20,000 or three times the monetary value of the offered bribe, fifteen years imprisonment, and disqualification "from holding any office honor, trust, or profit under the United

States." 18 U.S.C. Section 201 (e) (1982).[1] On this count of the indictment, he was sentenced to five years imprisonment. The maximum penalty under Section 1503 is a fine of $5,000 and five years imprisonment. On this count Renfroe was sentenced to three years of probation, to commence after completion of the five years prison sentence imposed on the bribery count. Pursuant to 18 U.S.C. Section 201(k) (1982), the penalties prescribed in Section 210 are "separate from and in addition to" those prescribed

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[1] Congress amended 18 U.S.C. Section 201 in 1986, but the amendments were not effective until November 10, 1986, which was after Renfroe allegedly committed the acts charged in the indictment and after the indictment was filed. The section of the statute under which Renfroe was indicted, was filed. The section of the statute under which Renfroe was indicted, 18, U.S.C. Section 201(d) (1982), is now codified at 18 U.S.C. Section 201(b) (3) (1988). The only change was the deletion of the $20,000 figure from the fine provision, thereby making the maximum fine simply three times the monetary value of the offered bribe.

in Section 1503.[2] Thus, if convicted upon retrial, Renfroe could constitutionally receive a more stringent sentence than the one originally imposed, and could face additional penalties even after the time he has already served had been credited. In addition, even absent any further sentence to be served, it is still significant whether or not a conviction stands on Renfroe's record. The actual sentence imposed is but one of the consequences of a criminal conviction. Cf. Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977) (Even after sentence was fully served, appeal was not moot given possibility of collateral legal consequences from criminal conviction, and state could obtain review to preserve its ability to impose such collateral consequences on defendant). This is

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[2] This provision is presently codified at 18 U.S.C. Section 201(e) (1988).

especially true where, as here, the Defendant is a licensed attorney and the charged offense involves the attorney's conduct in practicing law. Cf. United States v. Lee, 720 F. 2d 1049, 1054 (9th Cir. 1983) ("[A]lthough the sentence has been served, the case is not moot as a criminal conviction has collateral consequences. This is particularly true for an attorney convicted of criminal contempt of court, whose professional status may be affected by the conviction." (citaton omitted)); Jessup v. Clark, 490 F. 2d 1068, 1070 (3d Cir. 1973) (Attorney's appeal of criminal conviction after sentence had been fully served was not moot because of potential collateral consequences including "at least caus[ing] the institution of disciplinary proceedings.").

Moreover, the lack of double jeopardy bar from having already served a

sentence may be established by analogy to the double jeopardy cases involving resentencing. For example, in Jones v. Thomas, 109 S. Ct. 2522 (1989), the state court had vacated the defendant's shorter and completely served sentence for an underlying felony, and then credited the time already served toward the remaining longer sentence for felony murder. The U.S. Supreme Court held that this crediting of time served cured the double jeopardy problem originally created by the imposition of sentences both for an underlying felony and for felony murder. Even though the defendant had completely served the shorter sentence, by crediting the time served, the court had ensured that the total punishment did not exceed that authorized by the legislature. Id. at 2525-26. Similarly, in United States v. McMillen, 917 F. 2d 773, 776-77 (3d Cir. 1990), the Third Circuit held that

the Government's appeal of the defendant's sentence pursuant to a federal statue did not violate the Double Jeopardy Clause, despite the fact that the defendant had already begun to serve his sentence. The court found that the defendant had no expectation of finality in his sentence until the appeal was concluded.

Finally, we note that the cases cited by Defendant in support of his argument do not compel a contrary conclusion. Beyond cases stating the general proposition for which the Double Jeopardy Clause stands, Defendant cites United States v. Halper, 109 S. Ct. 1892 (1989). Halper, however, is not on point; rather, it sets forth a process to determine when, following a criminal conviction, a further civil sanction may be considered punishment and therefore subject to the constraints of the Double Jeopardy Clause. Contrary to Defendant's

contention that under Halper any further penalty must be "remedial" rather than "punitive" test applies only to the analysis of when a civil sanction is subject to the Double Jeopardy Clause. Id. at 1901-03. Similarly, the "rare case" analysis that Defendant quotes from Halper, 109 S. Ct. at 1902, refers to the rare civil case that would present such disproportionate sanctions as to be the equivalent of criminal punishment for purpose of the Double Jeopardy Clause.

Therefore, we find that the Double Jeopardy Clause does not prohibit retrying Renfroe even after he has served his original sentence in full. Rather the appropriate remedy is to credit the time he served toward the sentence he receives if he is convicted again at his second trial.

B. Insufficiency of the Evidence

Defendant's second argument is

that a retrial is prohibited under Lockhart v. Nelson, 488 U.S. 33 (1988), Lockhart further developed the holding in Burks v. United States, 437 U.S. 1 (1978), in which the U.S. Supreme Court created the single existing exception to the general rule that the Double Jeopardy Clause does not bar a retrial after a criminal conviction is reversed on appeal. See United States v. Curtis, 683 F. 2d 769, 773 (3d Cir.), cert. denied, 459 U.S. 1018 (1982). Under that exception, if the reason for the reversal is a finding of insufficiency of the evidence at trial, the Double Jeopardy Clause prohibits a second trial. Burks, 437 U.S. at 11. More specifically, if the prosecution fails at the first trial to introduce sufficient evidence on any element of the crime charged, the defendant may not be subjected to a second trial.

Defendant contends that the

reversal of his conviction for incompetency at the time of his trial and sentencing constitutes a reversal for insufficiency of the evidence and that consequently a retrial is barred as double jeopardy. He points out that the prosecution bears the burden of proving that a defendant is compentent to stand trial, United States v. Digilio, 538 F. 2d 972, 988 (3d Cir. 1976), cert. denied sub nom. Lupo v United States, 429 U.S. 1038 (1977), and maintains that when the Government failed to prove Renfroe's competency to stand trial, United States v. Renfroe, 745 F. Supp. 203, 210-11 (D. Del. 1990), it failed to introduce sufficient evidence for a conviction. However, this argument erroneously equates incompetence to stand trial with insufficiency of the evidence. Competency to stand trial is not an element of the crime with which Renfroe was charged see

DiGilio, 538 F. 2d at 988, and failure to prove competency does not constitute insufficiency of the evidence.

Moreover, in Burks, the Supreme Court explicitly distinguished a reversal for insufficiency of the evidence, after which retrial is prohibited, from a reversal for "trial error," which does not bar a second trial. 437 U.S. at 14-16. The rationale for this distinction is that a reversal for insufficiency of the evidence is functionally a ruling that the trial court should have entered a judgment of acquittal, and the Double Jeopardy Clause prohibits any retrial after an acquittal. Lockhart, 488 U.S. at 39. Thus, prohibiting retrial of a defendant after a reversal for insufficiency of the evidence is necessary to place the defendant in the same situation he or she would have faced had the trial court ruled properly. Id. By contrast, a reversal

for trial error simply indicates that the trial was not properly conducted, and "it implies nothing with respect to the guilt or innocence of the defendant." Burks, 437 U.S. at 15. In such a case, a retrial may be conducted to protect both the defendant's interest "in obtaining a fair readjudication of his guilt free from error" and the public's interest in "insuring that the guilty are punished." Id.

Upon appeal of Renfroe's conviction in the present case, the Third Circuit remanded the case and we overturned Renfroe's conviction on the grounds of his incompetence to stand trial. Thus, the reversal of Renfroe's conviction indicates only that the trial court should have held a hearing and found Renfroe incompetent to stand trial at that time. The result of a court's finding a defendant incompetent to stand trial is

not to enter a judgment of acquittal, but to defer trial until the defendant is competent. See Drope v. Missouri, 420 U.S. 162 183 (1975) (Since nunc pro tunc determination of defendant's competence at time of trial was not possible, case remanded and government was "free to retry [defendant], assuming, of course, that at the time of such trial he is competent to be tried."); Bruce v. Estelle, 536 F. 2d 1051, 1062-63 (5th Cir. 1976) (reversing conviction and remanding case for retrial after finding defendant was incompetent at time of trial), cert. denied, 429 U.S. 1053 (1977). Consequently, the Burks rationale of restoring the status quo also indicates that a retrial is permissible in the present case.

Thus, we find that the reversal of Renfroe's conviction does not fit within the Burks exception to the general rule that the Double Jeopardy Clause does not

bar retrial after reversal of a conviction. Rather, this case falls in the "trial error" category set forth in Burks, and a retrial would not violate the Double Jeopardy Clause. Therefore, the Double Jeopardy Clause does not require dismissal of the indictment against Renfroe.

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III. CONCLUSION

For the reasons we have stated, we concluded that the Double Jeopardy Clause does not prohibit retrying Renfroe, and we consequently deny Defendant's Motion to Dismiss the Indictment. As a result, we have also reached the government's Motion for Notice of Entrapment Defense, and have set forth the procedure by which the Government will be permitted to inquire as to Defendant's plans regarding any entrapment defense. An appropriate order will follow.